

1 ERSKINE & TULLEY
 2 A PROFESSIONAL CORPORATION
 2 MICHAEL J. CARROLL (STATE BAR #50246)
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5 Attorneys for Plaintiff **E-filing**

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7

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

10
 11 BOARD OF TRUSTEES OF THE AUTOMOTIVE CV 08 NO. 1292
 12 INDUSTRIES WELFARE FUND, AUTOMOTIVE)
 12 INDUSTRIES PENSION FUND; JIM BENO,)
 13 TRUSTEE,)
 13)
 14 Plaintiffs,)
 14)
 15 vs.)
 15)
 16 OMEGA TANK AND TRUCK REPAIR, INC.,)
 16 a California corporation,)
 17)
 18 Defendant.)
 19)

COMPLAINT**VRW**

20 Plaintiffs complain of defendant and for a cause of action
 21 allege that:

22 1. Jurisdiction of this Court is founded upon Section
 23 301(c)(1) of the National Labor Relations Act of 1947 [29 U.S.C.
 24 §185(a)] and Section 502 of the Employee Retirement Income Security
 25 Act of 1974, said Act being hereinafter referred to as "ERISA" (29
 26 U.S.C. §1132), in that defendant has violated a collective bargaining
 27 agreement and certain Trust Agreements, thereby violating provisions
 28 of ERISA and the provisions of the National Labor Relations Act of

COMPLAINT

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1 1947. This action is also brought pursuant to the Federal Declaratory
2 Judgment Act (28 U.S.C. § 2201 et seq.) in a case of actual
3 controversy between plaintiffs and defendant, and for a Judgment that
4 defendant pay fringe benefit contributions in accordance with its
5 contractual obligations.

6 2. Plaintiffs, BOARD OF TRUSTEES OF THE AUTOMOTIVE
7 INDUSTRIES WELFARE FUND, AUTOMOTIVE INDUSTRIES PENSION FUND,
8 (hereinafter "TRUST FUNDS"), named in the caption, are trustees of
9 employee benefit plans within the meaning of §§3(1) and (3) and
10 §502(d)(1) of ERISA, 29 U.S.C. §1002(1) and (3) and §1132(d)(1), and
11 a multi employer plan within the meaning of §§3(37) and 515 of ERISA,
12 29 U.S.C. §§1002(37) and §1145. Plaintiff JIM BENO is a Trustee.
13 Said TRUST FUNDS are authorized to maintain suit as independent legal
14 entities under §502(d)(1) of ERISA, 29 U.S.C. §1132(d)(1).

15 3. Plaintiffs are informed and believe and thereupon
16 allege that defendant, OMEGA TANK AND REPAIR, INC., is found and is
17 doing business in this judicial district.

18 4. Each and every defendant herein is the agent of each
19 and every other defendant herein. Defendant and each of them are
20 engaged in commerce or in an industry affecting commerce.

21 5. At all times pertinent hereto defendant was bound by
22 written collective bargaining agreements with East Bay Automotive
23 Machinists Local Lodge 2182, a labor organization in an industry
24 affecting commerce. The aforesaid agreements provide that defendant
25 shall make contributions to the TRUST FUNDS on behalf of defendant's
26 employees on a regular basis on all hours worked, and that defendant
27 shall be bound to and abide by all the provisions of the Trust
28 Agreements.

1 6. Defendant has breached both the provisions of the
2 collective bargaining agreements and the Trust Agreements above
3 referred to by failing to complete and send in monthly reports and/or
4 to pay all moneys due thereunder on behalf of defendant's employees
5 to the TRUST FUNDS. Said breach constitutes a violation of ERISA (29
6 U.S.C. 1002, et seq.) and of the National Labor Relations Act of 1947.

7 7. Pursuant to the terms of the collective bargaining
8 agreements there is now due, owing and unpaid from defendant to the
9 TRUST FUNDS contributions for hours worked by covered employees found
10 due by a payroll audit for the period January 1, 2003 through December
11 31, 2006 and liquidated damages, interest and testing fees which are
12 specifically provided for by said agreements. The total amount due
13 is \$17,202.29; additional amounts may become due during the course of
14 this litigation and in the interest of judicial economy, recovery of
15 said sums will be sought in this case. Interest is due and owing on
16 all principal amounts due and unpaid at the legal rate from the dates
17 on which the principal amounts due accrued.

18 8. Demand has been made upon said defendant, but defendant
19 has failed and refused to pay the amounts due the TRUST FUNDS or any
20 part thereof; and there is still due, owing and unpaid from defendant
21 the amounts set forth in Paragraph 7 above.

22 9. An actual controversy exists between plaintiffs and
23 defendant in that plaintiffs contend that plaintiffs are entitled to
24 a timely monthly payment of trust fund contributions now and in the
25 future pursuant to the collective bargaining agreements and the Trust
26 Agreement, and defendant refuses to make such payments in a timely
27 manner.

28 10. The Trust Fund does not at this time seek to audit the

1 books and records of defendant. The only issue raised in this
2 complaint is defendant's failure to pay the correct amount of
3 contributions due. The Trust Fund seeks to obtain a judgment for any
4 outstanding delinquent contributions based on defendant's reports and
5 to reserve the right to audit defendant for this or any other
6 unaudited period.

7 11. The Trust Agreement provides that, in the event suit
8 is instituted to enforce payments due thereunder, the defendant shall
9 pay court costs and a reasonable attorneys' fee. It has been
10 necessary for plaintiffs to employ ERSKINE & TULLEY, A PROFESSIONAL
11 CORPORATION, as attorneys to prosecute the within action, and a
12 reasonable attorneys' fee should be allowed by the Court on account
13 of the employment by plaintiff of said attorneys.

14 WHEREFORE, plaintiff prays:

15 1. That the Court render a judgment on behalf of plaintiffs
16 for all contributions due and owing to the date of judgment, plus
17 liquidated damages provided for by the contract, interest at the legal
18 rate, testing fees, reasonable attorneys' fees incurred in prosecuting
19 this action and costs.

20 2. That the Court enjoin the defendant from violating the
21 terms of the collective bargaining agreement and the Trust Agreements
22 for the full period for which defendant is contractually bound to file
23 reports and pay contributions to the TRUST FUNDS.

24 3. That the Court reserve plaintiffs' contractual right to
25 audit defendant for months prior to judgment, and in the event of such
26 audit, collect any additional sums which may be due.

27 4. That the Court retain jurisdiction of this cause pending
28 compliance with its orders.

1 5. For such other and further relief as the Court deems
2 just and proper.

3 DATED: March 4, 2008

ERSKINE & TULLEY
A PROFESSIONAL CORPORATION

4 By:

5 Michael J. Carroll
6 Attorneys for Plaintiffs

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The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

BOARD OF TRUSTEES OF THE AUTOMOTIVE INDUSTRIES WELFARE FUND, AUTOMOTIVE INDUSTRIES PENSION FUND, JIM BENO, TRUSTEE,

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF ALAMEDA
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
ERSKINE & TULLEY
220 Montgomery Street, Suite 303
San Francisco, CA 94104
(415) 392-5431

DEFENDANTS

OMEGA TANK AND TRUCK REPAIR, INC., a California corporation,

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

II. BASIS OF JURISDICTION

(PLACE AN "X" IN ONE BOX ONLY)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

PTF	DEF	PTF	DEF
Citizen of This State	<input type="checkbox"/> 1 <input checked="" type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4 <input checked="" type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2 <input checked="" type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5 <input checked="" type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3 <input checked="" type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input checked="" type="checkbox"/> 6

IV. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

<input type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	Transferred from <input type="checkbox"/> 5 another district (specify) _____	<input type="checkbox"/> 6 Multidistrict Litigation	Appeal to District Judge from <input type="checkbox"/> 7 Magistrate Judgment
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V. NATURE OF SUIT

(PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury Med Malpractice	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury Product Liability	PROPERTY RIGHTS	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce/ICC Rates/etc.
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers Liability	PERSONAL PROPERTY	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 371 Truth in Lending	LABOR	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 850 Securities/Commodities/Exchange
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 720 Labor/Mgmt Relations	<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury		<input type="checkbox"/> 730 Labor/Mgmt Reporting & Disclosure Act	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 195 Contract: Product Liability			<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 892 Economic Stabilization Act
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	HABEAS CORPUS:	<input type="checkbox"/> 862 Black Lung (9231)	<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing Accommodations	<input type="checkbox"/> 530 General	<input type="checkbox"/> 863 DIWC/DIWV (405ig)	<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 864 SSD Title XVI	<input type="checkbox"/> 950 Constitutionality of State Statutes
<input type="checkbox"/> 245 Torts Product Liability	<input type="checkbox"/> 446 Other Civil Rights	<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 890 Other Statutory Actions
<input type="checkbox"/> 290 All Other Real Property		<input type="checkbox"/> 550 Civil Rights	FEDERAL TAX SUITS	
		<input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	
			<input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	
			SOCIAL SECURITY	
			<input type="checkbox"/> 791 End Ret Inc Security Act	

VI. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE
DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

Section 502 of the Employee Retirement Income Security Act [29 U.S.C. §1132]. This action seeks to compel defendants to pay delinquent trust fund contributions pursuant to the collective bargaining agreement and other agreements executed by defendants and Automotive Unions

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION
 UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:
JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY

PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE
"NOTICE OF RELATED CASE."

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2)
(PLACE AN "X" IN ONE BOX ONLY)

SAN FRANCISCO/OAKLAND

SAN JOSE

DATE

3-3-08

SIGNATURE OF ATTORNEY OF RECORD

Michael J. Carroll (St. Bar #50246)